

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
MARINE POWER AND EQUIPMENT
COMPANY, INC.,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB Nos. 81-141, 81-142
& 81-143

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of three \$250 civil penalties for alleged emission of particulate matter in violation of respondent's Sections 9.03(b), 9.11(a) and 9.15(a) of Regulation I, came on for hearing before the Pollution Control Hearings Board, David Akana and Gayle Rothrock, Members, convened at Lacey, Washington on January 19, 1982. William A. Harrison, Administrative Law Judge, presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney, George S. Martin. Respondent appeared by its attorney, Keith D. McGoffin. Reporter Lois Fairfield

1 recorded the proceedings.

2 Witnesses were sworn and testified. Exhibits were examined. From
3 testimony heard and exhibits examined, the Pollution Control Hearings
4 Board makes these

5 FINDINGS OF FACT

6 I

7 Respondent, pursuant to RCW 43.21B.260 has filed with this Board a
8 certified copy of its Regulation I containing respondent's regulations
9 and amendments thereto, of which official notice is taken.

10 II

11 On August 6, 1982, respondent Puget Sound Air Pollution Control
12 Agency (PSAPCA) received a citizen complaint concerning visible
13 emissions into the air. Respondent's inspector went to the
14 complainant's place of business, a food processing facility located on
15 the Duwamish Waterway in Seattle. The inspector observed rust-colored
16 emissions emanating from a barge tied to a pier in the shipyard next
17 door to the complainant. This is the appellant's (Marine Power's)
18 shipyard. The emissions resulted from abrasive blasting being
19 performed on the barge for removal of rust. The day in question was
20 Thursday, an ordinary working day. The emission in question would be
21 as apparent to Marine Power as it was to the complainant and
22 respondent's inspector.

23 III

24 Placing himself in a proper position (relative to the sun, the
25 direction of the emission and other factors), the inspector observed

26 FINAL FINDINGS OF FACT,
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1 the emission so as to read its opacity. During the observation of not
2 more than 20 minutes, the emission was of 25-50% opacity for 15-1/2
3 minutes.

4 IV

5 The inspector observed that the emission rose into the air and
6 settled onto the next door property where the complainant, a
7 supervisor of the food processing operation, was working. The
8 emission settled as a fine, black dust onto the buildings, grounds and
9 automobiles at the food processing site. The dust was sufficient to
10 cause employees at the site to leave their workplace out of concern
11 for damage to their automobiles. The dust caused irritation to the
12 complainant's face and hands and was extremely irritating to his eyes,
13 causing him to flush his eyes with water.

14 V

15 The inspector went to the shipyard of Marine Power and asked a
16 guard for permission to enter the fenced enclosure. This was granted
17 and the inspector advanced to the offices of the facility where he
18 asked to see the superintendent. A man identifying himself as such
19 granted permission to the inspector to visit the barge. Another man
20 within the office accompanied the inspector.

21 At the barge, the inspector observed that abrasive blasting was
22 being carried out which was the source of the airborne particulate
23 matter. Reasonable precautions to prevent particulate matter from
24 becoming airborne during abrasive blasting include either tarp
25 covering or water spray dampening. Neither of these precautions were

1 being taken. Appellant presented no evidence that any precaution was
2 being taken to prevent the emission of particulate matter from
3 becoming airborne.

4 VI

5 Marine Power received three Notices and Orders of Civil Penalty
6 from PSAPCA, each assessing a \$250 civil penalty (\$750 total). The
7 Orders cited violation of respondent's Sections 9.03(b), 9.11(a) and
8 9.15(a) of Regulation I. From this appellant appeals.

9 VII

10 Any Conclusion of Law which should be deemed a Finding of Fact is
11 hereby adopted as such.

12 From these Findings the Board enters these

13 CONCLUSIONS OF LAW

14 I

15 Section 9.03(b) of respondent's Regulation I states:

16 (b) After July 1, 1975, it shall be unlawful
17 for any person to cause or allow the emission of any
18 air contaminant for a period or periods aggregating
19 more than three (3) minutes in any one hour which is:

20 (1) Darker in shade than that designated
21 as No. 1 (30% density) on the Ringelmann Chart, as
22 published by the United States Bureau of Mines; or

23 (2) Of such opacity as to obscure an
24 observer's view to a degree equal to or greater than
25 does smoke described in Subsection 9.03(b)(1);
26 provided that, 9.03(b)(2) shall not apply to fuel
27 burning equipment utilizing wood residue when the
particulate emission from such equipment is not
greater than 0.05 grain per standard cubic foot.

We reject appellant's contention that respondent's inspector must
compare the Ringelmann Chart to an emission while observing it. The

FINAL FINDINGS OF FACT,
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1 Ringelmann Chart is merely a measure of darkness, Section 9.03(b)(1)
2 supra. Opacity which obscures an observer's view to the same degree
3 as that darkness (20% density) is also prohibited. Respondent proved
4 an opacity of 20% or greater in excess of permissible time limitations
5 and thus proved that the emission in question violated the standard of
6 Section 9.03(b)(2).

7 II

8 Section 9.11(a) of respondent's Regulation I states:

9 It shall be unlawful for any person to cause or
10 permit the emission of an air contaminant or water
11 vapor, including an air contaminant whose emission is
12 not otherwise prohibited by this Regulation, if the
13 air contaminant or water vapor causes detriment to
14 the health, safety or welfare of any person, or
15 causes damage to property or business. (Emphasis
16 added.)

17 The test for determining whether emissions are detrimental to the
18 welfare of any person, under Section 9.11, is not expressly stated in
19 respondent's Regulation I. Such a test must therefore be inferred
20 with particular reference to the policy of respondent's Regulation I.
21 That policy is to "secure and maintain such levels of air quality as
22 will prevent injury to property...(and) foster the comfort and
23 convenience" of the people. Section 1.01 and RCW 70.94.011. The
24 antithesis of this policy is "air pollution" which is defined as the
25 "emission of" and "air contaminant" which "is, or is likely to be,
26 injurious to...property, or which unreasonably interferes with
27 enjoyment of life and property." Section 1.07(c), (d), and (e) and
RCW 70.94.030(1), (2), and (8).

1 The emission of air contaminant is therefore detrimental to the
2 welfare of a person, and unlawful under Section 9.11, when it
3 unreasonably interferes with a person's enjoyment of life and
4 property. Such emissions are inimical to the policy of respondent's
5 Regulation I. Crow Roofing and Sheet Metal, Inc., v. Puget Sound Air
6 Pollution Control Agency, PCHB No. 1098 (1977); Boulevard Excavating,
7 Inc., v. Puget Sound Air Pollution Control Agency, PCHB No. 77-69
8 (1977); Cudahy Company v. Puget Sound Air Pollution Control Agency,
9 PCHB No. 77-98, et seq (1977). The emission in question caused
10 substantial discomfort and annoyance to the complainant, a person of
11 normal sensibilities. The emission unreasonably interfered with
12 enjoyment of life and property at the food processing neighbor of
13 appellant and thereby proved detrimental to the welfare of persons
14 working there. The emission in question violated the standard of
15 Section 9.11(a).

16 III

17 Section 9.15(a) of respondent's Regulation I states:

18 (a) It shall be unlawful for any person to
19 cause or permit particulate matter to be handled,
20 transported or stored without taking reasonable
precautions to prevent the particulate matter from
becoming airborne.

21 Particulate matter is defined as "any material, except water in an
22 uncombined form, that is or has been airborne and exists as a liquid
23 or a solid at standard conditions." Section 1.07(w) of respondent's
24 Regulation I. The emission in question was of particulate matter.
25 Where, as here, a party is shown to have permitted particulate matter

26 FINAL FINDINGS OF FACT,
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1 to become airborne, a presumption arises that reasonable precautions
2 were not taken. The burden of proceeding with the evidence then
3 shifts to that party (appellant) to show reasonable precautions.
4 Boulevard Excavating, Inc., v. Puget Sound Air Pollution Control
5 Agency, PCHB No. 77-69 (1977), Weyerhaeuser Company v. Puget Sound Air
6 Pollution Control Agency, PCHB No. 1076 (1977) and Kaiser Aluminum
7 Company v. Puget Sound Air Pollution Control Agency, PCHB No. 1079 and
8 1085 (1977). Appellant failed to rebut that presumption, which
9 presumption was bolstered by the failure to use tarps or water spray
10 in connection with the sandblasting. The emission in question
11 violated the standard of Section 9.15(a).

12 IV

13 Appellant contests its liability for the violative emissions in
14 question. It asserts that respondent's case should be dismissed
15 because there was no proof that appellant owned the barge or conducted
16 the abrasive blasting which gave rise to the emissions. We disagree.

17 The barge was tied to appellant's pier within the appellant's
18 shipyard. When the inspector asked to speak with the superintendent
19 of appellant's facility, that person undertook to grant permission to
20 approach the barge. This and the other evidence in this case combine
21 to support our conclusion that the barge was in the shipyard with
22 appellant's consent.

23 The barge being tied to appellant's premises with appellant's
24 consent, on a normal working day, on which appellant's superintendent
25 and others were present, and the emission from the abrasive blasting

1 being openly and obviously apparent to those within and without the
2 premises, and appellant adducing no evidence that it attempted to
3 control the emissions or withdraw its consent for moorage, we conclude
4 that appellant allowed or permitted the emissions in question. To
5 "allow" or "permit" a prohibited emission is conduct prohibited by
6 Sections 9.03(b), 9.11(a) and 9.15(a). This is so regardless of
7 whether appellant owned the barge or employed the abrasive blasting
8 operator. Likewise this is so whether appellant's personnel actually
9 saw the emission which because it was open and apparent, they should
10 have seen. Scienter is not an element of any of the three sections
11 cited. See also Section 2, chapter 175, Laws of 1980. RCW 70.94.040.

12 V

13 Appellant violated Sections 9.03(b), 9.11(a) and 9.15(a) of
14 respondent's Regulation I.

15 VI

16 Appellant has violated respondent's rules by abrasive blasting
17 operations on two occasions prior to this matter. See Marine Power
18 and Equipment Company, Inc., v. Puget Sound Air Pollution Control
19 Agency, PCHB No. 80-139 (1980). The amount of penalty assessed by
20 respondent is fully justified.

21 VII

22 We have considered the other contentions of appellant and find
23 them to be without merit.

24 VIII

25 Any Finding of Fact which should be deemed a Conclusion of Law is
26 hereby adopted as such.

1 From these Conclusions the Board enters this

2 ORDER

3 The three \$250 civil penalties (Nos. 5246, 5247 and 5248) are each
4 affirmed (total \$750).

5 DONE at Lacey, Washington this 23rd day of March, 1982.

6 POLLUTION CONTROL HEARINGS BOARD

7
8 Gayle Rothrock
9 GAYLE ROTHROCK, Member

10
11 David Akana
12 DAVID AKANA, Member

13
14 William A. Harrison
15 WILLIAM A. HARRISON
16 Administrative Law Judge